were purely partisan. Instead, the court said "[t]here is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage." J.S. App. 85a. It added: "With Republicans in control of the State Legislature, they set out to increase their representation in the congressional delegation to 22. As we will explain, *all that happened thereafter flowed from this objective* . . . ." *Id.* (emphasis added); *see also* JA 195-96. These and other passages in the court's opinion leave no doubt that the court knew precisely what it was saying.

4. Finally, appellees suggest there is a legitimate state interest in passing a new map just so there will be a map that was passed by the Legislature. They cite a Texas Attorney General's opinion in an attempt to show that the Legislature still had a duty to redistrict even after the courts had remedied its failure to do so in 2001. State Br. at 30-31 (quoting Op. Tex. Att'y Gen. No. GA-0063 (2003)). But the Attorney General said only that the Legislature retained the "authority" to act in 2003. He did not say that leaving the 2001 map in place would have violated any law, state or federal.[4] *See generally* JA 18-26.

Appellees point to language in prior cases that they say recognizes a legislative right to alter a court-drawn remedial plan. State Br. at 52-55. But this Court has never held that a legislature may sit on its hands when it has a constitutional duty to draw a map and then claim a right to alter a court-drawn remedial map years later when the duty has expired. *See Growe v. Emison*, 507 U.S. 25, 34-35 (1993)

---

[4] Even if state law had imposed such a duty, that cannot supply an independent justification for dramatically revamping the map. The fact that the Legislature shifted more than eight million Texans into new districts had nothing to do with a professed desire to enact a plan legislatively and everything to do with maximizing partisan advantage.

(recognizing States' constitutional duty "timely" to redistrict, "during the brief interval between completion of the decennial federal census and the [next] primary [election]"). And even assuming that such authority exists, it could only be exercised consistent with the Legislature's constitutional duty to avoid passing laws that lack a legitimate public purpose. Once the lawful court-drawn map "altered the status quo," *id.* at 35, the Legislature no longer could point to any legal duty to justify changing the status quo again. Nor could it exercise its redistricting power just to replace Representatives of a disfavored party, any more than Congress may exercise its power to regulate interstate commerce solely to help Democrat-owned businesses at the expense of competitors.

The Court's summary affirmance in *Cox v. Larios*, 542 U.S. 947 (2004), demonstrates this point. The Court has long held that States may redraw their legislative districts without having to justify population disparities of less than 10%. *See id.* at 951 (Scalia, J., dissenting) (citing cases). But *Cox* held that a legislature's exercise of that power cannot be designed to favor one political party by making all Republican-leaning districts more populous than Democratic-leaning districts. *See id.* at 947-51 (Stevens, J., concurring).[5]

II. The 2003 Plan Dilutes African-American Voting Strength and Violates the Voting Rights Act.

Unable to refute appellants' legal argument that the Fifth Circuit's "50% Rule" misinterprets Section 2 of the Voting Rights Act,[6] the State and its *amicus*, the United States,

---

[5] Appellants incorporate the one-person, one-vote arguments set forth in their opening brief and in Travis County's briefs in No. 05-254.

[6] *See* Jackson Br. at 32-39; *see also* Texas NAACP Br. at 17-39; LDF Br. at 6-16; North Carolina NAACP Br. at 4-17.

hardly try. State Br. at 72; U.S. Br. at 17, 23. Instead, they claim that this Court need not reach that issue because the trial court's factual findings provide an independent basis for rejecting appellants' Section 2 claim. They are wrong.

The court below clearly erred in holding that Anglos, rather than African-Americans, controlled District 24 under the 2001 plan. J.S. App. 110a-112a; *see Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (under the clear-error standard, requiring "extensive review" of findings that have not been reviewed and affirmed by an intermediate court). The analyses conducted by appellees' own expert are particularly telling and therefore are presented here in some detail.[7]

A. African-American Control of General Elections

The District Court concluded that African-American voters did not control general elections in the 2001 plan's District 24 because their opportunity to elect their preferred candidates "lies in coalitions with Anglos who vote with them in the general election for Democrats." J.S. App. 111a. But contrary to appellees' characterization (*see* State Br. at 14, 73), that is not a factual finding. It is merely a restatement of the 50% Rule. All coalitional-district claims barred by the 50% Rule seek to create minority opportunities that depend on crossover support in general elections. In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), this Court defined

---

[7] As noted above, the State chose not to call Professor Gaddie to testify, but his deposition was admitted in evidence. There, he conceded that the 2001 plan's District 24 "perform[ed] for African-Americans." JA 219. Moreover, his statistical analyses of that district — and of the five districts that replaced it in the 2003 plan — were admitted into evidence as parts of State Exhibits 1, 20 to 23, 30 to 33, and 46 to 51. Except where otherwise noted, all election statistics cited here come from those State Exhibits. These statistics are virtually identical to those derived by appellants' expert. J.S. App. 197a; *see* JA 92-119.

a "coalitional district" as one where a minority group's voters could "'form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice.'" *Id.* at 481 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)). So a coalitional district is, by definition, one where the minority group lacks unilateral control.

If this Court agrees that Section 2 protects coalitional districts, then the proper factual inquiry as to general elections focuses on whether the crossover vote is sufficiently reliable to allow the minority group a real opportunity to elect its favored candidates. That test clearly was met here, as it was undisputed below that African-American voters in District 24 could elect their preferred candidates in general elections. *See, e.g.*, JA 100. The State's expert analyzed 20 general elections covering the entire district, 13 of which involved at least one minority candidate. Within District 24, the black-preferred candidates prevailed in all 20 general elections.

They won for four reasons. *First*, although the district is only 21.4% black in voting-age population (VAP) and (more relevantly) 25.7% black in citizen voting-age population (CVAP),[8] the actual electorate usually was slightly more than one-third black. *Second*, African-Americans voted cohesively, never giving less than 93% of their vote to their preferred candidate. *Third*, black-preferred candidates received near-unanimous support from Latinos, who constituted 3% to 7% of the electorate. *Fourth*, black-preferred candidates usually received between 15% and 25%

---

[8] A particularly clear example of the District Court's erroneous fact-finding is its statement that District 24 was "less than 22% [black in] CVAP." J.S. App. 110a. *But see* JA 339 (showing the district's CVAP to be 25.7% black, 20.8% Latino, and 49.8% Anglo).

of the Anglo vote.[9] Given the first three reasons listed above, that small but reliable Anglo crossover vote was enough to put the black-preferred candidate over the top every time.

African-American former Dallas Mayor Ron Kirk's 2002 campaign for U.S. Senate is instructive. In the general election, 38% of the votes in District 24 were cast by minority voters, who gave Kirk 98% of their votes. Even with the benefit of being a local Dallas-based candidate — what appellees term the "'friends and neighbors' effect" (State Br. at 80, 85) — Kirk received only 28% of the Anglo vote. But that was enough for a double-digit victory in District 24, even as Kirk was losing statewide.

B. African-American Control of Primary Elections

To the extent that the District Court found that African-American voters did not control Democratic primaries in District 24 (*see* J.S. App. 110a-112a), the court clearly erred. Appellees' own expert analyzed 11 Democratic primaries or runoffs covering all of former District 24. Nine of those 11 contests involved at least one minority candidate. Within District 24, the black-preferred candidate prevailed 10 of 11 times. The only exception was Morris Overstreet, an under-funded candidate in the 1998 primary for Attorney General, who received an abysmal 18.7% of the vote statewide.[10]

---

[9] The District Court clearly erred when it found "an Anglo crossover rate of 30.75 [percent] (unweighted mean)" in general elections. J.S. App. 111a; *see* U.S. Br. at 7. That figure was taken verbatim from the State's post-trial brief, which reported the average Anglo crossover rate in four Democratic primaries and runoffs — not in general elections. *See* State Defs.' Post-Trial Br. at 34-35 (filed Dec. 22, 2003). In general elections, appellees' expert found that the Anglo crossover rate usually fell between 15% and 25%, exceeding 30% in only 2 of the 20 contests he analyzed.

[10] Appellees suggest that the 2002 Court of Criminal Appeals primary shows lack of black control and lack of black political cohesion in District 24. State Br. at 80, 85, 86 n.99. That is flat wrong. In that

Black-preferred candidates won these Democratic primaries for two reasons. The first was that, in all 11 primaries, a majority of voters were African-American — and in the most recent elections, between 61% and 69% of the voters were African-American. By contrast, no more than 16% of the voters were Anglo in any of the 11 contests — making Anglos the third largest portion of the electorate.

The District Court discounted these figures by speculating that Anglo turnout in the Democratic primary would balloon if an African-American challenged District 24's Anglo Congressman, Martin Frost. J.S. App. 111a. But the court ignored appellees' expert analysis showing that Anglo Democrats were vastly outnumbered in 11 separate contests, nine of which involved a minority candidate. Even when Anglo Congressmen John Bryant (in the 1996 primary and runoff) and Ken Bentsen (in the 2002 primary) ran for U.S. Senate against prominent minority candidates (Latino Victor Morales in 1996 and African-American Ron Kirk in 2002), Anglo voters did not rush into the Democratic primary to support them. Indeed, black voters outnumbered Anglo voters more than four-to-one in each of those elections. Although the District Court, appellees, and their *amici* all speculate about what might happen in a future biracial congressional primary, their conjecture is unsupported by any record evidence. *See* State Br. at 77-79 (predicting

---

primary, pitting African-American candidate Julius Whittier against Anglo candidate Pat Montgomery, fully 60% of the district's black vote went to Montgomery, who carried the district handily. *See* J.S. App. 112a. The State focuses solely on the fact that the black candidate got only 40% of the district's black vote. But the important fact is that 60% of the black vote united behind one candidate, and that candidate won. For the State to suggest that the color of a candidate's skin bars him from being a minority-preferred candidate is "an affront to our constitutional traditions." *De Grandy*, 512 U.S. at 1027 (Kennedy, J., concurring).

unprecedented shifts in turnout patterns, but citing no evidence); U.S. Br. at 15-17 (same); J.S. App. 111a.[11]

The second reason for black success in District 24's Democratic primaries was that blacks voted cohesively for their preferred candidates. In 10 of the 11 elections, the black-preferred candidate carried more than 65% of the black vote. And in most of the more recent elections, the black-preferred candidate carried more than 80% of the black vote and thus prevailed with at least 66% of the total vote.

For example, in 2002, Mayor Ron Kirk carried the district in both the U.S. Senate primary (with 66% of the total vote) and the runoff (with 75% of the total vote), even though he was opposed both times by a majority of Latino and Anglo voters. His advantage as a local favorite therefore cannot account for his victories. The real reason why Kirk won was the cohesive support he received from the African-American community in these racially polarized contests.

---

[11] The evidence from former District 25 in the Houston area further undercuts this speculation. In 2002, when that district had a hotly contested Democratic congressional runoff between an Anglo candidate and an African-American candidate, the electorate got blacker, not whiter. JA 120-21.

Likewise, the record evidence contradicts appellees' general assertion that District 25's election of an Anglo-preferred candidate in 2002 somehow shows Anglo control of District 24. State Br. at 81-82; *see also* U.S. Br. at 15 n.5. Former District 25 consistently showed much lower black primary turnout than former District 24; and in the 2002 congressional primary and runoff, the Anglo-preferred candidate prevailed only because he attracted about a third of the black vote. *See, e.g.*, JA 94-100, 121-27. And, unlike District 24, District 25 was majority-Anglo in citizen voting-age population (CVAP). *Compare* JA 339 *with* State Br. at 87 n.102 (asserting that District 24 was not majority-minority in CVAP, while citing record evidence expressly contradicting that assertion) *and* U.S. Br. at 12 & n.2 (similar).

C. African-American Cohesion

The District Court's statement that black political cohesion in the Democratic primaries was "far from certain" may or may not be a factual finding. J.S. App. 112a; *cf.* State Br. at 73, 84. But if it is, it is clearly erroneous. As discussed above, African-Americans gave no less than 93% of their vote to their preferred candidate in every one of the 20 general elections analyzed by appellees' expert. Moreover, African-Americans were cohesive in the Democratic primaries, where the ultimate winners were effectively chosen: There, the black-preferred candidate usually garnered more than 80% of the black vote and almost always garnered more than 65%. Such landslide results establish "minority political cohesion" within the meaning of *Gingles*'s second prong. *See Growe*, 507 U.S. at 40.

D. Anglo Bloc Voting

Appellees assert that the District Court found insufficient Anglo bloc voting to satisfy the third *Gingles* prong. State Br. at 73, 88 (citing J.S. App. 111a). But here again, it is far from clear that the court intended to make such a finding. And if it did, that finding again was clearly erroneous. The question under *Gingles*'s third prong is whether, absent a district drawn to bring minority voters together, Anglo bloc voting will usually defeat the minority's preferred candidates. Here, the minority population from District 24 was split among five new districts, each of which is dominated by Anglo Republicans. JA 102-06. In these five districts, appellees' expert analyzed 19 general elections, 12 of which involved a minority candidate. In all five new districts, the candidates preferred by black voters lost *every* general election by double-digit margins, for two reasons.

First, in each of the five new districts, the electorate typically is less than one-fifth black — by contrast with former District 24, where the electorate typically was more

than one-third black. So in each of the five new districts, there are four or five Anglo voters for every black voter, while in District 24 the ratio was always below two-to-one.

Second, Anglos voted as a bloc to defeat black-preferred candidates in all five new districts, in all 19 elections. For example, in new District 26, which now includes southeast Fort Worth's black community (J.S. App. 199a; Fort Worth NAACP Br. at 13), on average only 18% of Anglo voters supported the black-preferred candidate in general elections. *See Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (substantially higher crossover rate); *Thornburg v. Gingles*, 478 U.S. 30, 80-82 (1986) (finding bloc voting where crossover rate was as high as 42%); *see also* U.S. Br. at 7, 24 n.13 (declining to endorse the District Court's statement that a 30.75% crossover rate establishes the absence of Anglo bloc voting under *Gingles*'s third prong (citing J.S. App. 111a)).

Tellingly, in the 2002 general election for U.S. Senate, Ron Kirk carried only 36% to 41% of the total vote in the five new districts. In sum, the cohesive African-American community that prevailed in 10 of 11 primaries and 20 of 20 general elections under the old map is now splintered among five districts where its candidates inevitably get trounced by opponents winning support almost exclusively from Anglos.

E. The 50% Rule on the Merits

For the reasons set forth in our opening brief (and in the other briefs cited *supra* note 6), the Court should reject the 50% Rule and make clear that the Voting Rights Act requires no quotas. Just as a State could not decree "that certain districts had to be at least 50 percent white," *Bush v. Vera*, 517 U.S. 952, 996 (1996) (Kennedy, J., concurring), the Court should not conclude that Congress mandated that all minority districts be at least 50% minority and that effective minority districts not meeting that test may be eliminated.

In a State like Texas, where no single race or ethnicity constitutes a majority of the population, to demand that every Member of Congress represent a majority-Anglo, majority-Latino, or majority-black district would be a travesty. The goals of the Voting Rights Act are ill served by carving our electorate into such blocs. "If our society is to continue to progress as a multi-racial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991). As Judge Ward noted below, even though "[t]he evidence demonstrate[d] that District 24 . . . functioned as a district that fostered our progression to a society that is no longer fixated on race," the Fifth Circuit's 50% Rule permitted the Legislature to dismantle that district in 2003. J.S. App. 196a, 199a. This Court should reject that Rule and hold that the 2003 plan violates Section 2 of the Voting Rights Act.

III. District 25 Is a Racial Gerrymander.

Appellees' defense of the irregularly shaped District 25 — justifying it as the byproduct of a "[p]olitical [c]hoice" to protect a nearby Republican incumbent (State Br. at 105) — runs headlong into this Court's precedent in *Bush v. Vera*, 517 U.S. 952 (1996), which held that protection of nearby incumbents cannot justify an excessively race-conscious district. Although appellants raised that legal argument repeatedly in their opening brief (*see* Jackson Br. at i, 16, 43, 48-49), none of the appellees or their *amici* has any response.

Instead, they just point to the District Court's finding that politics, not race or ethnicity, predominated in drawing District 25. State Br. at 108-18. But no one claims that the Legislature wanted to add a *Democratic* district to the map. Rather, it is undisputed that the Legislature set out to add a new majority-Latino district because it had made a political decision to destroy one elsewhere and wished to avoid a

finding of retrogression under the Voting Rights Act. In so doing, the Legislature plainly contravened *Bush v. Vera*.

As appellees concede, the map's chief sponsor in the Texas House testified at trial that the Legislature drew District 25 as a 300-mile-long majority-Latino district to avoid "'creat[ing] issues for DOJ'" under Section 5. State Br. at 115-16 (quoting Rep. Phil King). That, of course, is precisely the motive that generated the racial gerrymanders invalidated in *Miller v. Johnson*, 515 U.S. 900, 921-27 (1995), and *Shaw v. Hunt*, 517 U.S. 899, 911-13 (1996).

Appellees try to defend District 25's shape by saying that *whole* counties form the rural "land bridge" connecting the two Latino concentrations. State Br. at 111 n.114. They note that the Georgia district struck down in *Miller v. Johnson* split 8 of its 22 counties, while the Texas district splits only 2 of 9. *Id.* But the split counties contain more of the total district population here than in the Georgia district. *See* JA 28; CONGRESSIONAL DISTRICTS IN THE 1990S, at 220 (1993).

The State also argues that District 25's shape does not reflect the predominance of race because the Legislature did not "exclude" "'substantial intervening Anglo population'" when it hooked the Latino areas of Austin to the city of McAllen, 300 miles away. State Br. at 110, 114 (quoting Jackson Br. at 46). But the counties in District 25's land bridge contain fewer than 42,000 Anglos, while the parallel string of counties immediately to its east contains 138,000 Anglos and the parallel string to the west contains 162,000 Anglos.[12] The mapmakers clearly took the path from McAllen to Austin that best avoided Anglo population so as

---

[12] *See* Texas Legislative Council, Population Analysis (Plan 1374C), http://www.tlc.state.tx.us/redist/pdf/c1374/red100.pdf; JA 298.

to maximize the district's Latino percentage. *See Miller*, 515 U.S. at 919-25 (striking down a "max-black" district).

As shown in our opening brief, nothing about South Texas's "unique geography and population dispersion" (State Br. at 109) demanded this bizarre district. Jackson Br. at 47 & n.40. Appellees' expert conceded that prior congressional maps, as well as the current state senate, state house, and state board of education maps, avoid districts as elongated as District 25 in South Texas. *Id.* And the GI Forum's Plan 1385C shows that one can avoid such shapes even in drawing seven, rather than six, Latino districts in that part of Texas.

Finally, appellees' arguments about compactness scores (State Br. at 112-15) fail as well. Appellants highlight District 25's "Smallest Circle" score not because it is the worst in the 2003 map; as appellees note, in any map, one district has to be the worst. State Br. at 113 & n.116. Rather, appellants highlight this score because it is the worst of any district — congressional, state senate, state house, or state board of education — ever used in Texas. Indeed, the State's expert conceded that District 25's score is worse than those of the three districts this Court invalidated in *Bush v. Vera*, as well as a half-dozen congressional districts in other States that were found to be racial gerrymanders subject to strict scrutiny in the 1990s. *See* Jackson Br. at 46-48 & nn.39-40.

The creation of District 25 was nothing but "a calculated stretch to find voters of a particular ethnic makeup." J.S. App. 155a. The district needlessly heightens the significance of race and thus clearly violates the Equal Protection Clause.

CONCLUSION

The Court should reverse the judgment below and instruct the District Court to grant relief for the 2006 election.

Respectfully submitted,

J. GERALD HEBERT
J. GERALD HEBERT P.C.
5019 Waple Lane
Alexandria, VA 22304
(703) 567-5873

Counsel for the "Democratic Congressional Intervenors"

PAUL M. SMITH
Counsel of Record
SAM HIRSCH
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

Counsel for the "Jackson Plaintiffs"

February 22, 2006

FILED
FEB 1 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(18) (19) (18)

Nos. 05-204, 05-276, and 05-439

In the Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL., APPELLANTS

v.

RICK PERRY, GOVERNOR OF TEXAS, ET AL.

EDDIE JACKSON, ET AL., APPELLANTS

v.

RICK PERRY, GOVERNOR OF TEXAS, ET AL.

GI FORUM OF TEXAS, ET AL., APPELLANTS

v.

RICK PERRY, GOVERNOR OF TEXAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

PAUL D. CLEMENT
Solicitor General
Counsel of Record

WAN J. KIM
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

DAVID K. FLYNN
LISA J. STARK
NATHANIEL S. POLLOCK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

This brief addresses the following questions:

1. Whether the State's redistricting plan violates Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, because it redrew the lines of old District 24, in which African Americans constituted 21.4% of the voting age population.

2. Whether the State's redistricting plan violates Section 2 of the Voting Rights Act because it establishes six rather than seven majority-Hispanic districts in South and West Texas, where Hispanics constitute 58% of the citizen voting age population.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 9
Argument 11
I. Section 2 did not require the Texas legislature to include a district comparable to old District 24 in its 2003 Plan 11
A. Appellants failed to establish the first *Gingles* precondition 11
B. This case does not require the court to decide whether a minority group must always show that it is a majority to establish a Section 2 claim 17
II. Section 2 did not require the State to create seven majority-Hispanic districts in South and West Texas 24
A. Appellants failed to establish that seven effective majority-Hispanic districts could be drawn in South and West Texas 24
B. In any event, the more-than-proportional electoral opportunities for hispanics in South and West Texas support the district court's rejection of that claim 27
Conclusion 30

TABLE OF AUTHORITIES

Cases:

Abrams v. *Johnson*, 521 U.S. 74 (1974) 18
Balderas v. *Texas*, 536 U.S. 919 (2002) 3, 7, 11, 24

Cases—Continued: Page

Campos v. *City of Houston*, 113 F.3d 544 (5th Cir. 1997) 20
Chisom v. *Roemer*, 501 U.S. 380 (1991) 1
Counsin v. *Sundquist*, 145 F.3d 818 (6th Cir.), cert. denied, 525 U.S. 1138 (1999) 20
Garza v. *County of Los Angeles*, 918 F.2d 763 (9th Cir.), cert. denied, 498 U.S. 1028 (1991) 20
Georgia v. *Ashcroft*, 539 U.S. 461 (2003) ..... *passim*
Growe v. *Emison*, 507 U.S. 25 (1993) ... 1, 2, 12, 16, 18, 19
Hall v. *Virginia*, 385 F.3d 421 (4th Cir. 2004) 20
Holder v. *Hall*, 512 U.S. 874 (1994) 1, 22
Jackson v. *Perry*, 125 S. Ct. 351 (2004) 9
Johnson v. *De Grandy*, 512 U.S. 997 (1994) ..... *passim*
Metts v. *Murphy*, 363 F.3d 8 (1st Cir. 2004) 20, 21
McNeil v. *Springfield Park Dist.*, 851 F.2d 937 (7th Cir.), cert. denied, 490 U.S. 1031 (1989) 20, 22
Miller v. *Johnson*, 515 U.S. 900 (1996) 23
Parker v. *Ohio*, 263 F. Supp. 2d 1100 (S.D. Ohio), aff'd, 124 S. Ct. 574 (2003) 18
Shaw v. *Hunt*, 517 U.S. 899 (1996) 28
South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 1
Thornburg v. *Gingles*, 478 U.S. 30 (1986) ..... *passim*
Valdespino v. *Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848 (5th Cir.), cert. denied, 528 U.S. 1114 (2000) 19, 20
Vieth v. *Jubelirer*, 541 U.S. 267 (2004) 9
Voinovich v. *Quilter*, 507 U.S. 146 (1993) .. 1, 2, 12, 18, 19

Statutes and rules: Page

Voting Rights Act of 1965, 42 U.S.C. 1971 *et seq.*:
§ 2, 42 U.S.C. 1973 ..... *passim*
§ 2(a), 42 U.S.C. 1973(a) 1
§ 2(b), 42 U.S.C. 1973(b) 2, 19
§ 4, 42 U.S.C. 1973b 12
§ 5, 42 U.S.C. 1973c 5, 20
§ 12, 42 U.S.C. 1973j(d) 1
Tex. Elec. Code Ann. (2003):
§ 63.001 15
§§ 162.002-003 15
§ 162.010 15

Miscellaneous:

Michael Barone & Richard E. Cohen, *The Almanac of American Politics* (2005) 15

INTEREST OF THE UNITED STATES

These cases involve, *inter alia*, claims that the State of Texas's congressional redistricting plan violates Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. The United States has primary responsibility for enforcing Section 2. See 42 U.S.C. 1973j(d). The Court's decision in this case therefore could have an important effect on federal enforcement efforts. Indeed, the United States has participated as either a party or an amicus curiae in all of the Court's cases involving amended Section 2 of the Voting Rights Act. See, *e.g.*, *Holder* v. *Hall*, 512 U.S. 874 (1994); *Johnson* v. *De Grandy*, 512 U.S. 997 (1994); *Voinovich* v. *Quilter*, 507 U.S. 146 (1993); *Growe* v. *Emison*, 507 U.S. 25 (1993); *Chisom* v. *Roemer*, 501 U.S. 380 (1991); *Thornburg* v. *Gingles*, 478 U.S. 30 (1986).

STATEMENT

In 2003, the State of Texas enacted the new congressional districting plan that is the subject of these appeals. This brief addresses the primary challenges brought to that plan under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. First, appellants claim that the plan violates Section 2 because it redrew the former District 24 in the Dallas-Fort Worth area in which African Americans constituted 21.4% of the voting age population. Second, appellants claim that the plan violates Section 2 because it created six rather than seven majority-Hispanic districts in South and West Texas, where Hispanics comprise about 58% of the citizen voting age population (CVAP). The district court's decision rejecting those Section 2 challenges should be affirmed.

1. Congress passed the Voting Rights Act to rid the country of racial discrimination in voting. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315 (1966). Section 2(a) of the Act, which was amended by Congress in 1982, prohibits any "standard, practice, or procedure * * * which results in a denial

or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 42 U.S.C. 1973(a). Section 2(b) provides that the Act is violated when, "based on the totality of circumstances, it is shown that * * * a class of citizens * * * [has] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b).

In *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986), this Court ruled that, as a precondition to establishing a claim of vote dilution in violation of Section 2, a plaintiff must show that: (1) a minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group is "politically cohesive"; and (3) the "white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." These conditions "are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district," and that the "challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population." *Growe* v. *Emison*, 507 U.S. 25, 40 (1993). "Unless these points are established, there neither has been a wrong nor can there be a remedy." *Id.* at 40-41. However, even if a plaintiff can establish "the three *Gingles* prerequisites," *id.* at 40, a court must still consider "the totality of the circumstances" to determine whether the statute has been violated. *Gingles*, 478 U.S. at 79; see *Johnson* v. *De Grandy*, 512 U.S. 997, 1011 (1994).

As the Court has emphasized, "[o]nly if the apportionment scheme has the *effect* of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter." *Voinovich* v. *Quilter*, 507 U.S. 146, 155 (1993). Extending Section 2 beyond its proper reach

can inflict its own harm, the Court has warned, for "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics." *De Grandy*, 512 U.S. at 1020.

2. a. As a result of the 2000 census, the number of seats in the United States House of Representatives allocated to Texas increased from 30 to 32. J.S. App. 59a.[1] The Texas Legislature failed to adopt a redistricting plan. In 2001, a three-judge court in the Eastern District of Texas adopted a plan (Plan 1151C) to govern the State's 2002 congressional elections. *Ibid.*; see *id.* at 202a-215a. A number of parties appealed to this Court and challenged that plan on the ground that, *inter alia*, it violated Section 2 of the Voting Rights Act. This Court affirmed the order adopting the plan. *Balderas* v. *Texas*, 536 U.S. 919 (2002). The 2002 elections were held under the court-ordered plan. J.S. App. 60a.

b. On October 12, 2003, for the first time in more than a decade, the Texas Legislature enacted a new redistricting plan (Plan 1374C)—*i.e.*, the plan at issue. Among other things, the new plan redrew District 24 in the 2001 court-ordered plan. District 24 was "located in the Dallas-Fort Worth metroplex." J.S. App. 106a. District 24 and its predecessors had been represented by Congressman Martin Frost, a white Anglo Democrat, since 1978. *Ibid.* The district had an African American voting age population of 21.4% and a Hispanic voting age population of 33.6%; the Hispanic proportion of the citizen voting age population (CVAP) was smaller. *Id.* at 107a; see J.A. 337. The district was "approximately 60% Democrat." *Ibid.* The State's 2003 plan distributed the parts of

---

[1] Unless otherwise indicated, citations to "J.S. App." refer to the appendix to the jurisdictional statement in No. 05-276.

District 24 among six districts, in at least five of which the voting age population is between 5.7% and 15% African American. See J.A. 104-105.

c. The court-ordered 2001 plan contained six districts in South and West Texas encompassing all or parts of 44 counties, from El Paso in the far west to the Gulf of Mexico. One district (District 16) was centered on El Paso, and another (District 20) was located in San Antonio. To the east of El Paso was a relatively large district (District 23) with an east-west orientation along the Rio Grande. To the east of District 23 were two districts (Districts 28 and 15) with a north-south axis, and one district (District 27) that hugged the Gulf Coast. J.S. App. 116a-118a. All six of the districts had a CVAP that was majority Hispanic. *Id.* at 121a.

The State's 2003 plan added several "largely Republican and Anglo" areas to the north of District 23 that included a population of approximately 100,000 people, while removing largely Hispanic areas containing a like number of people from the eastern end of the district. J.S. App. 119a-120a. Whereas the CVAP of District 23 under the 2001 court-ordered plan was 57.5% Hispanic, under the State's 2003 plan the CVAP of District 23 was 46% Hispanic. *Id.* at 120a. At the same time, the State created an additional north-south district to the east of District 23, so that there were now three such districts (Districts 28, 25, and 15) between the eastern boundary of District 23 and District 27 along the Gulf of Mexico coast. The three districts run "from the population pockets near the border north through sparsely-populated areas to reach the pockets of population in the central part of the State, south and east of San Antonio and Austin." *Ibid.* The CVAP of each of the three districts is majority Hispanic. In addition, the El Paso, San Antonio, and Gulf Coast districts remain majority Hispanic in CVAP. Thus, of the seven South

and West Texas districts in the State's 2003 plan, six are majority Hispanic. *Id.* at 121a.

3. The new plan was submitted for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, and the United States did not interpose an objection. Appellants and others then filed challenges to the legality of the State's plan in the United States District Court for the Eastern District of Texas, claiming, *inter alia*, violations of Section 2 of the Voting Rights Act. A divided three-judge district court rejected the Section 2 and other claims. J.S. App. 57a-200a.

a. *General Principles.* The district court recognized that, in order "[t]o prevail on a claim of vote dilution under § 2, a plaintiff must, as a threshold requirement, satisfy the three now-familiar [*Gingles*] preconditions." J.S. App. 94a; see p. 2, *supra* (quoting *Gingles* preconditions). The court acknowledged that *Gingles* itself "withheld deciding whether there could ever be a showing of potential success without a showing that a clear majority could gather in the absence of the accused practice or structure." *Id.* at 94a-95a. But the court stated that, although "there are powerful reasons to be exacting, * * * the facts of this case offer no occasion to decide if there is a tolerable deviation from the rule that a minority must demonstrate that, absent an accused practice or structure, it had the potential to elect a candidate of its choice by proof that it could constitute 50% of the district." *Id.* at 96a.

The court also referred to this Court's recent decision in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), which arose under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. As the district court explained, the *Georgia* Court distinguished among three kinds of districts: majority-minority districts; "coalition districts," in which minority voters "are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice"; and "influ-

ence districts," in which "minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." J.S. App. 100a (quoting *Georgia*, 539 U.S. at 481-482). This Court held that "Section 5 gives States the flexibility to choose one theory of effective representation over the other." 539 U.S. at 482.

b. *District 24*. The district court rejected appellants' claim that the State's 2003 plan violates Section 2 because it redraws District 24 of the court-ordered 2001 plan. Applying the *Gingles* preconditions, the court noted that "the majority requirement of the first *Gingles* precondition cannot be met * * * by summing Black and Hispanic voter populations," because "there is no serious dispute but that Blacks and Hispanics do not vote cohesively in primary elections, where their allegiance is free of party affiliation." J.S. App. 99a; see *id.* at 111a. Accordingly, the court determined, the Section 2 claim concerning old District 24 had to be based, if at all, on the rights of African Americans, who constituted only 21.4% of the voting age population in the old District 24—substantially *less* than a majority.

Appellants claimed that, although African Americans in District 24 constituted less than 22% of the voting age population, the district still satisfied the first *Gingles* precondition because—although far from a majority—African Americans were still sufficiently numerous to elect the candidate of their choice in the district. Appellants further contended that African-Americans "control the Democratic primary" in District 24, and that the district as a whole will elect the Democratic candidate. J.S. App. 110a; see *id.* at 197a (Ward, J., concurring in part and dissenting in part).

The district court rejected appellants' claim of electoral control and found that appellants "overstate the impact of the Black Democrats' control of the primaries." J.S. App. 111a. The court noted that Congressman Frost had "not had a pri-